ROLE OF THE COURTS IN ORDERING ARBITRATION WHEN THE COLLECTIVE BARGAINING AGREEMENT ALLEGEDLY VIOLATES THE SHERMAN ACT

I. INTRODUCTION

Whether a party to a collective bargaining agreement can lawfully refuse to arbitrate a claim either because the contract arguably excluded it from arbitration or because the claim was founded on a clause allegedly violating the antitrust laws was the subject of the dispute in *Associated Milk Dealers, Inc. v. Milk Drivers Local 753*.[1] Because that decision considered both labor and antitrust policy in a single suit to compel arbitration, it will be used throughout this discussion as the factual basis for an analysis of certain questions as yet unresolved in both areas of law.

The *Associated Milk Dealers* controversy arose over the interpretation of a standard area labor contract between Chicago area dairies and the milk driver's union. When the union refused to submit the dispute to arbitration, the employers' association and individual dairies brought suit to compel arbitration under § 301 of the Labor Management Relations Act.[2] On a motion for summary judgment the district court ordered arbitration over the union's assertions that the parties did not intend to submit the dispute to arbitration and that part of the contract violated the antitrust laws. The Seventh Circuit reversed the order and remanded the case to the district court for a presentation of evidence on both of the union's claims. The action is noteworthy first for its cautious approach to "national labor policy [favoring] arbitration"[3] and second for its antitrust policy, each of which will be discussed separately below.

Associated Milk Dealers, Inc. (AMDI) and the Chicago Area Dairymen's Association (CADA) represented a number of employers in the 1967 negotiations for a new standard Chicago area contract. In anticipation of competition from a new milk processing plant then under construction by the Jewel supermarket chain, the employers sought to protect themselves should they be placed at a competitive disadvantage by the new plant. As a result the final contract provided:

> The Union shall furnish the Dealers a letter of understanding that if certain conditions come into the market which would create an inequitable

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[1] 422 F.2d 546 (7th Cir. 1970).

[2] 29 U.S.C. § 185(a) (1964) provides:

(a) Venue, amount, and citizenship.

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court in the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

[3] John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 549 (1964).

> situation relative to store operations, they would meet with the dealers for the purpose of negotiating an appropriate adjustment of the situation.[4]

The letter read in part:

> If certain conditions come into the market, which would create an inequitous (*sic*) situation relative to the store operations, or a similar situation effecting retail, the Union will meet with the Dealers upon written request for the purpose of negotiating an appropriate adjustment of the situation.[5]

In addition, the contract contained a broad arbitration clause which specifically excepted certain grievances from the arbitration process (the Jewel dairy problem was not one of them).[6] Finally, Article 20 contained the "most favored nation" provision which was later attacked as a violation of the antitrust laws:

> Should the Union hereafter enter into any agreement with any milk dealer upon terms and conditions more advantageous to such dealer than the terms and conditions of this Agreement, or should the Union sanction a course of conduct by any milk dealer who has signed this form of agreement enabling him to operate under more advantageous terms and conditions than those provided for in this Agreement the Employer shall be entitled to adopt such terms and conditions in lieu of those contained in this Agreement.[7]

Subsequently, the union signed a collective bargaining agreement with the new Hillfarm Dairy division of the Jewel chain, which contained terms more favorable to Hillfarm than those provided in the standard area contract. AMDI sought to adopt these terms for its members pursuant to the most favored nation clause and when the union refused to accept the changes, AMDI demanded arbitration with the results noted above.

II. The Duty To Arbitrate

Common law refusal to order the specific performance of an arbitration agreement[8] was laid to rest in the area of national labor relations by

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[4] 422 F.2d at 549.

[5] *Id.*

[6] "Any matter in dispute, between the Union and Employer [excepting wages and hours, as set forth in Articles 4, 37 and 41, and contributions to all existing Funds, as set forth in Articles 45, 47 and 48 and questions of jurisdictional matters, as decided by Teamsters Joint Council No. 25, which cannot be settled], shall be referred by either party to an Industry Labor Committee consisting of three [3] representatives of Employers, parties to this Agreement, and three [3] representatives of the Union. It shall be the duty of this Committee to hear and dispose of all complaints raised by either party to this Agreement concerning violations thereof that cannot be settled amicably between the parties. If this Committee is equally divided on any such complaint the Chief Justice of the Circuit Court or his nominee shall be called in to act as the impartial member of said Committee, and his decision shall be final. No action shall be taken by either party to the Agreement pending the decision of this Committee." *Id.* at 549-50.

[7] 422 F.2d at 549.

[8] *See, e.g.*, discussion in Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109 (1924) *and* In-

the *Lincoln Mills*[9] decision, in which the Supreme Court held that such agreements were specifically enforceable under § 301(a) of the Labor Management Relations Act (LMRA).[10] It had been previously argued by some that § 301(a) was merely jurisdictional in allowing federal courts to entertain labor suits without regard to diversity of citizenship or the amount in controversy.[11] But the Court rejected that interpretation of the statute and held that § 301(a) "authorizes federal courts to fashion a body of federal law for the enforcement of . . . collective bargaining agreements . . . ."[12] One of the tenets of that body of federal law was that an agreement to arbitrate, being the "*quid pro quo* for an agreement not to strike,"[13] is specifically enforceable.

The *Lincoln Mills* decision left undecided several questions which later confronted lower courts in executing their mandate "to fashion federal law where federal rights are concerned."[14] Primary among these questions was the role the courts should actually play in arbitration litigation. Indeed, this has been the threshold issue in all subsequent suits seeking specific performance of an agreement to arbitrate and it goes to the heart of the Seventh Circuit's decision in *Associated Milk Dealers*.

Supreme Court guidance on the role of the courts under § 301 was first announced in the *Steelworkers Trilogy*[15] of 1960, which limited judicial inquiry to "whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator the power to make the award he made."[16] In *American Manufacturing*[17] the employer declined to arbitrate a claim based on its refusal to reinstate an employee who had received workmen's compensation for an industrial injury, which supposedly left him with a 25 percent permanent partial disability. The same doctor who had supported the employee's earlier claim for workmen's compensation subsequently certified that he was "able to re-

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ternational Ass'n. of Machinists v. Cutler-Hammer, Inc., 271 App. Div. 917, 67 N.Y.S.2d 317, *aff'd*, 297 N.Y. 519, 74 N.E.2d 464 (1947).

[9] Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

[10] 29 U.S.C. § 185(a) (1964).

[11] United Steelworkers of America v. Galland-Henning Mfg. Co., 241 F.2d 323, 325 (7th Cir. 1957); Mercury Oil Refining Co. v. Oil Workers Int'l. Union, 187 F.2d 980, 983 (10th Cir. 1951). *Contra*, Signal-Stat Corp. v. Local 475, United Electrical R. & M. W., 235 F.2d 298, 300 (2d Cir. 1956); Ass'n. of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 210 F.2d 623, 625 (3d Cir. 1954), *aff'd on other grounds*, 348 U.S. 437 (1955).

[12] Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 451 (1957).

[13] *Id.* at 455.

[14] *Id.* at 457.

[15] United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

[16] United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960).

[17] United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960).

turn to his former duties without danger to himself or to others."[18] Relying upon the seniority provisions of the contract, the union demanded reinstatement of the employee and, when the company refused to arbitrate, it brought suit under § 301(a). The district court granted the employer's motion for summary judgment on an estoppel theory, while the Sixth Circuit affirmed on the ground that the grievance was "a frivolous, patently baseless one, not subject to arbitration under the collective bargaining agreement between the parties."[19] The Supreme Court reversed.

In *Warrior & Gulf*[20] the collective bargaining agreement contained a broad arbitration clause but excluded from that process matters which were "strictly a function of management."[21] The contract was silent on the matter of contracting out part of the firm's work to other companies, which contributed in part to a lay off of some employees and became the subject of an employee grievance. When negotiations failed to settle the dispute and the employer refused to arbitrate, the union brought suit under § 301(a).

In its findings of fact the district court concluded that the contract could not be interpreted "to confide in an arbitrator the right to review the defendant's business judgment in contracting out work"[22] and that such a decision is strictly a function of management within the exclusionary clause of the agreement. The Fifth Circuit affirmed,[23] but the Supreme Court reversed and the employer was forced to arbitrate.

The third case in the *Steelworkers Trilogy* was *Enterprise Wheel*,[24] in which an arbitrator awarded immediate reinstatement with back pay as damages for the wrongful discharge of several employees. At the time of the reinstatement order, the collective bargaining agreement had expired and the company refused to comply with the award on the ground

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[18] 264 F.2d 624, 625 (6th Cir. 1959).

[19] *Id.* at 628.

[20] United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

[21] Issues which conflict with any Federal statute in its application as established by Court procedure or matters which are strictly a function of management shall not be subject to arbitration under this section.

Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this Agreement, or should any local trouble of any kind arise, there shall be no suspension of work on account of such differences but an earnest effort shall be made to settle such differences immediately in the following manner:

. . . .

Fifth, if agreement has not been reached the matter shall be referred to an impartial umpire for decision. The parties shall meet to decide on an umpire acceptable to both. If no agreement on selection of an umpire is reached, the parties shall jointly petition the United States Conciliation Service for suggestion of a list of umpires from which selection will be made. The decision of the umpire shall be final. *Id.* at 576-77.

[22] 168 F.Supp. 702, 705 (S.D. Ala. 1958).

[23] 269 F.2d 633 (5th Cir. 1959).

[24] United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

that the arbitrator exceeded his authority in ordering reinstatement after the term of the contract. The district court ordered the firm to comply with the award,[25] but the Fourth Circuit reversed for the reasons advanced by the employer.[26] The Supreme Court upheld the arbitrator.

In all three cases the Court was careful to recognize that the duty to arbitrate rests on voluntary contractual intent, not statutory command. But at the same time the Court also determined that federal policy under § 301 strongly favors the arbitration of grievances whenever possible. Consequently, the role of the courts in § 301 litigation was strictly limited to interpreting the arbitration clause. The Court pointed out that:

> An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. *Doubts should be resolved in favor of coverage.*[27]

Thus, despite the district court's finding of fact in *Warrior & Gulf* that contracting out work was "strictly a function of management" and beyond the scope of the arbitration clause, the Supreme Court nevertheless required the employer to arbitrate a contracting out grievance because:

> In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad. Since any attempt by a court to infer such a purpose necessarily comprehends the merits, the court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator.[28]

A literal application of this language to the issues in *Associated Milk Dealers* would suggest that rather than reversing the district court's order to arbitrate, the Seventh Circuit should have affirmed. Certainly the arbitration clause itself was broad enough to encompass a dispute over the application of the most favored nation clause. Moreover, the language cited in support of an intent to exclude it from arbitration was hardly "forceful" or even specific in comparison to the exclusionary clause of *Warrior & Gulf*, where arbitration was ordered despite that clause.[29] Note, however, that the order to arbitrate in *Associated Milk*

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[25] 168 F.Supp. 308 (S.D. W. Va. 1958).

[26] 269 F.2d 327 (4th Cir. 1959).

[27] 363 U.S. at 582-83 (emphasis supplied).

[28] *Id.* at 584-85.

[29] *But cf.* Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962), where the facts that arbitration could be invoked only at the option of the union and limited to employee grievances were sufficient evidence of an intent to exclude from arbitration the employer's claim for damages caused by a walk out. Under the circumstances the Court held that the contract was ". . .

Dealers was granted on a motion for summary judgment and that on review the circuit court found "genuine issues of material fact concerning whether the parties agreed to arbitrate . . . ."[30] The theory of this finding relies upon the decision in *John Wiley & Sons, Inc. v. Livingston*[31] and cases interpreting it.

Wiley was a case in which an employer signed a collective bargaining agreement with the union and then merged his business with the Wiley firm, which continued to operate it in substantially the same manner as before the sale. The union brought suit against Wiley under § 301(a) to compel the arbitration of a grievance based upon rights under the old contract; and despite the fact that Wiley had not signed the old agreement, the Supreme Court affirmed the order directing arbitration. In doing so the Court established a new tenet of national labor policy which holds that under circumstances similar to the *Wiley* case a successor employer can be bound by the provisions of his predecessor's labor contract. Then interpreting the old contract, the Court held Wiley bound to arbitrate.

More important to the present inquiry is the opinion's delineation of the role of the judiciary in § 301 litigation. In contrast to earlier decisions which focused upon the limits of judicial authority under § 301, *Wiley* in part addressed itself to judicial powers under that section. Thus, unless the power is expressly conferred upon the arbitrator himself, the court should decide the question of arbitrability:

> The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty. Thus, just as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate so *a fortiori*, it cannot be compelled to arbitrate if an arbitration clause does not bind it at all.[32]

Such language could be considered the basis for greater judicial participation in § 301 litigation, particularly when the contract itself is unclear about the scope of arbitration and is supplemented by some collateral agreement, such as the letter concerning potential competition written pursuant to the new *Associated Milk Dealers* contract.

Courts are clearly within the boundaries of the *Steelworkers Trilogy* when interpreting exclusionary language contained within the collective bargaining agreement itself. Indeed, *Warrior & Gulf* was just such a case and was reversed only because the lower courts inquired too deeply into the merits of the grievance, which is the province of the

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not susceptible to a construction that the company was bound to arbitrate its claim for damages . . ." and allowed the employer to proceed with his suit under § 301. 370 U.S. at 241.

[30] 422 F.2d at 550.

[31] 376 U.S. 543 (1964) [hereinafter cited as *Wiley*].

[32] *Id.* at 547.

arbitrator. The limitation upon the scope of judicial inquiry to what might be called prima facie arbitrability is the source of disagreement among the circuits over the admissibility of evidence of the parties' bargaining history. Justice Brennan addressed himself to this question in his concurring opinion to the *Steelworkers Trilogy*. Referring to the exclusionary clause in *Warrior & Gulf*, he said:

> Here, a court may be required to examine the substantive provisions of the contract to ascertain whether the parties have provided that contracting out shall be a "function of management." If a court may delve into the merits to the extent of inquiring whether the parties have expressly agreed whether or not contracting out was a "function of management," why was it error for the lower court here to evaluate the evidence of bargaining history for the same purpose?[33]

Representative of a strict approach to the admissibility of evidence of bargaining history is the *Abell*[34] case, which reached the Fourth Circuit after a judgment on the pleadings sustained the employer's request for arbitration. Much like the *Associated Milk Dealers* contract, the *Abell* agreement called for *negotiations* should the employer decide to introduce certain technologies into the plant.[35] Introduction of those technologies precipitated a dispute which led to the company's suit to compel arbitration under § 301. In considering the motion for judgment on the pleadings, the district court rejected a union proffer of evidence of bargaining history and said that since it was unable to decide the issue of coverage with positive assurance either way, the question should be for the arbitrator.[36] Citing the *Warrior & Gulf* statement that "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail,"[37] the union argued that the district court should have received its "most forceful evidence."

The Fourth Circuit assigned two reasons for rejecting that agument. First, the contract itself provided that the arbitrator should decide all differences over contract interpretation, including whether "the disputed issue is covered by the terms of this contract, and including the interpretation of all language contained in this contract."[38] The court's second reason for rejecting the union's argument that its evidence was admissible was:

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[33] 363 U.S. at 572 (concurring opinion).

[34] A. S. Abell Co. v. Baltimore Typographical Union No. 12, 338 F.2d 190 (4th Cir. 1964).

[35] It should be noted that the *Associated Milk Dealers* contract also called for *negotiations* should a particular event, *i.e.*, a change in market conditions, occur. However, unlike the *Abell* court, the Seventh Circuit concluded that, "[r]eference in the contract [and the ensuing letter] to meetings 'with the dealers for the purpose of negotiating' . . . suggest negotiation through collective bargaining and not arbitration." 422 F.2d at 551. Thus, the question for the district court to decide on remand is the scope of that exclusion.

[36] 230 F.Supp. 962, 966-67 (D. Md. 1964).

[37] 363 U.S. at 585.

[38] 338 F.2d at 192, 194.

> If the meaning of section 3(k) [of the contract] as it pertains to the situation before us were entirely clear it would become the duty of the court to declare that meaning. But since we agree that the meaning is not clear beyond rational debate, we hold that the court correctly referred the issue of arbitrability to the tribunal the parties previously expressly agreed upon, namely, the Board of Arbitration itself. Both the language and the philosophy of the agreement make it the function of the Board of Arbitration to decide the issue of arbitrability.[39]

In other words, if a reasonable construction of the agreement would hold the grievance arbitrable, the trial court should have ordered arbitration, even though the Board of Arbitration might ultimately find the grievance nonarbitrable.[40] The reason for this solution is that national policy favors the expertise of arbitrators over that of the courts in settling labor disputes.

The adoption of a strict policy against the admissibility of evidence of bargaining history in § 301 cases encourages the use of summary procedures not involving a full scale trial. This certainly advances national policy favoring the arbitration of labor disputes and is probably justified in those situations where the contract itself specifically excludes a matter from arbitration. But although national policy favors arbitration, it does not compel it where the parties have not adopted that form of resolving their disputes. Thus, the use of summary procedures to order arbitration where it has not in fact been agreed upon runs contrary to the equally valid goal of upholding the intent of the parties.

The evidentiary conflict usually occurs in those cases in which arbitrability is the subject of a collateral or special agreement. In the absence of other evidence, a court is then faced with the dilemma of considering collective bargaining history or abdicating its responsibility to determine "whether or not the [party] was bound to arbitrate, as well as what issues it must arbitrate. . . ."[41] Thus, even in the Second and Fifth Circuits where evidence of bargaining history is ordinarily inadmissible, such evidence is considered "where the contract claim and its relationship to the written contract is vague or unclear. . . ."[42] However, under no circumstances ". . . will the courts examine bargaining

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[39] *Id.* at 195.

[40] *Accord,* Communication Workers of America v. S. W. Bell Tel. Co., 415 F.2d 35 (5th Cir. 1969); IUE v. General Electric Co., 332 F.2d 485 (2d Cir. 1964), *cert. denied,* 379 U.S. 928 (1964); Ass'n. of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 283 F.2d 93 (3d Cir. 1960).

[41] John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 547 (1964), *citing,* Atkinson v. Sinclair Refining Co., 370 U.S. 238, 241 (1962).

[42] Communications Workers of America v. S. W. Bell Tel. Co., 415 F.2d 35, 40 (5th Cir. 1969); Strauss v. Silvercup, Inc., 353 F.2d 555 (2d Cir. 1965).

history where judicial construction of the arbitration clause in question would involve the resolution of the underlying dispute."[43]

Perhaps the real difference between the circuits over the admissibility of collective bargaining history is the relative weight they assign in each case to the competing policies of individual versus national determination of the manner in which labor disputes should be resolved. The Labor Management Relations Act represents a compromise between the two in that it expressly affirms the principle of voluntary agreement while strongly favoring arbitration as the preferable method among those available. So, as indicated earlier, the *Abell* court declined further inquiry and ordered arbitration when the contract did not conclusively exclude a matter from arbitration. Yet when confronted with very similar language pertaining to "negotiations," the Seventh Circuit in *Associated Milk Dealers* remanded the case for further inquiry into the intent of the parties because "[b]argaining history is relevant in determining whether parties intended to submit a particular dispute to arbitration."[44] It is submitted that the latter approach is consistent with the Supreme Court's command that "[d]oubts should be resolved in favor of coverage"[45] so long as the courts do not thereby usurp the arbitrator's role of deciding the merits of the underlying dispute.

III. The Antitrust Claims

Up to this point the discussion has concerned itself with the labor policy considerations in *Associated Milk Dealers* separate from the antitrust claims advanced in the case. Because the most favored nation clause affected both areas of law, the focus of what follows will be upon the antitrust aspects of the case and their interaction with the labor policies examined above.

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[43] Communications Workers of America v. S. W. Bell Tel. Co., 415 F.2d 35, 40 n. 11 (5th Cir. 1969).

[44] 422 F.2d at 551. In Strauss v. Silvercup, 353 F.2d 555 (2d Cir. 1965), the court said at 558:

> But the mere fact that neither of two proffered interpretations of an exclusionary clause, one of which would permit arbitration, the other of which would prevent it, is frivolous or unreasonable on its face, does not mean, as the trial court apparently believed, that the court must order the parties to proceed to arbitration. We believe that the trial court should have accepted proffered proof relevant to the intentions of the parties at the time they drafted their agreement. The duty of arbitrate being contractual in origin, the court must make an effort to construe the extent of that contractual duty, rather than force arbitration even of arbitrability upon parties who did not bind themselves to such a submission. Further inquiry may well enable the trial court to say with positive assurance that the exclusionary clause covers this dispute, so that the request for an order compelling arbitration should be denied. On the other hand, further inquiry may also indicate that the trial court cannot positively declare that the parties intended to exclude the dispute from arbitration—in which case, the trial court must issue an order directing the parties to proceed to arbitration.

[45] United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 583 (1960).

In addition to its contract interpretation defenses, the Milk Drivers Union also argued that because the most favored nation clause violated the Sherman Act it should be relieved of its duty to arbitrate a grievance arising under it. The Seventh Circuit held that summary dismissal of this claim was error and agreed that if the union could prove the clause violative of the Sherman Act, it would be relieved of its duty to arbitrate. Two issues arise with respect to that decision. One is the validity of the claim itself. The other is the court's refusal to allow an arbitrator even to consider the merits of that defense.

Concerning the validity of the antitrust claim, the union argued that a most favored nation clause violates the Sherman Act[46] on the basis of *United Mine Workers v. Pennington*.[47] *Pennington* was a suit brought by the trustees of the United Mine Workers (UMW) welfare fund against a small coal mining firm for royalties due under the terms of a multi-employer collective bargaining agreement.[48] The employer, Phillips Brothers Coal Co., counterclaimed under §§ 1 and 2 of the Sherman Act alleging that the UMW and the trustees had conspired with certain large mine operaters to eliminate small companies like Phillips from business. The crux of the counterclaim was the union's promise to impose a uniform wage scale upon all mine operators without regard to ability to pay. The Sixth Circuit affirmed a jury verdict favoring the counterclaim.[49] On appeal, the Supreme Court held that although a union is entitled to seek uniform wages and to make agreements with multi-employer bargaining units, it "forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units."[50] The Court, nevertheless, reversed the judgment on other grounds. Although in *Pennington* the Court split into three groups of three justices each, that principle was recently affirmed by a 5-4 majority in *Ramsey v. United Mine Workers*,[51] a case resembling *Pennington* in many ways.[52]

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[46] 15 U.S.C. §§ 1, 2 (1964).

[47] 381 U.S. 657 (1965).

[48] The National Bituminous Coal Wage Agreement of 1950 virtually ended serious labor strife in the bituminous coal industry by giving the employees and the UMW high wages and profit royalties in return for employer control over work practices and automation. The defendant, Phillips Brothers Coal Co., signed the standard agreement in 1953, 1955, and 1956. 381 U.S. at 659.

[49] Pennington v. UMW, 325 F.2d 804 (6th Cir. 1963).

[50] 381 U.S. at 665.

[51] 401 U.S. 302 (1971).

[52] The challenged "Protective Wage Clause" reads:

> During the period of this Contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this Contract on any basis other than those specified in this Contract or any applicable District Contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other

Comparing the most favored nation clause with the *Pennington* agreement, the union in *Associated Milk Dealers* argued that both agreements were in essence identical because both surrendered the union's "freedom of action with respect to its bargaining policy."[53] So, while the *Pennington* agreement *prospectively* bound the union to the terms of a contract with one bargaining unit, the most favored nation clause accomplished the same thing except that it acted *retrospectively*. Therefore, it was argued, both clauses should receive identical treatment under the antitrust laws.

In this regard, the union alleged that the most favored nation clause was illegal per se. Support for this position has been attributed to language following Mr. Justice White's statement of the conditions under which organized labor loses its antitrust exemption:

> One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry.[54]

Nevertheless, the Seventh Circuit held that such language did not establish a per se rule because "the actual holding of *Pennington* requires proof of the predatory purpose of the agreement between a union and the employers."[55]

On the other hand, the Seventh Circuit was not prepared to dismiss the antitrust claim, as the district court had done, because it read *Pennington* to require an analysis of predatory purpose and anticompetitive effect before such practices could be condemned under the Sherman Act. Thus, the union argued that even if a most favored nation clause is not anticompetitive when applied to milk dealers, the Jewel dairy was not a milk dealer because it was a captive dairy organized to supply the needs of Jewel supermarkets. It did not act as an intermediate wholesaler by purchasing milk from the processors and delivering it to retail distributors, as was the practice of the milk dealer signatories to the standard contract. Instead, the Jewel dairy processed and delivered milk only for the benefit of its own supermarkets. So, application of the most favored nation clause based upon the Jewel contract would be economically unjustified because the nature of Jewel's dairy operation entitled

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terms and conditions of this Contract and will use and exercise its continuing best efforts to obtain full compliance therewith by each and all the parties signatory thereto. 401 U.S. at 304-305.

[53] Brief for Appellant at 31-36, Associated Milk Dealers, Inc. v. Milk Drivers Union, 422 F.2d 546 (7th Cir. 1970), *citing*, 381 U.S. at 668.

[54] Comment, *Union-Employer Agreements and the Antitrust Laws: The Pennington and Jewel Tea Cases*, 114 U. PA. L. REV. 901, 909 (1966), *citing*, 381 U.S. at 665-66.

[55] 422 F.2d at 553. *Accord*, Ramsey v. UMW, 401 U.S. 302 (1971) (Douglas, J., dissenting).

it to more favorable terms than those given the complainant-milk dealers. If the union could show that imposition of the standard area contract upon Jewel would have been economically unjustified, it would not only bolster its argument that the parties never intended the most favored nation clause to be triggered by the Jewel contract, but would also support the claim of prohibited anticompetitive effect. Therefore, the Seventh Circuit concluded that a remand for a hearing of the evidence on both of these issues was appropriate.

It is at this point in the litigation that a conflict between the policies of antitrust and labor law could arise, if the Seventh Circuit was correct in holding that courts are the only appropriate forum for the resolution of antitrust claims. The problem involves the scope of judicial inquiry on remand. In addition to the question of Jewel's status as a milk dealer, proof of predatory purpose and anticompetitive effect could necessitate a judicial inquiry into collective bargaining history. That such evidence is relevant and admissible in an antitrust inquiry is shown by the Supreme Court's treatment of similar evidence in *Pennington* and *Ramsey v. United Mine Workers*.[56] In *Pennington*, a substantial portion of the defendant's counterclaim was based upon evidence of collective bargaining negotiations between the union and the larger coal companies. The admission of such evidence was apparently accepted by a majority of the justices as legitimate proof of an illegal conspiracy because evidence of unilateral union activity or of the labor contract alone would have been insufficient to sustain a Sherman Act allegation.[57]

However, if on the remand of *Associated Milk Dealers* the district court must admit evidence of collective bargaining history in order to rule on the union's antitrust claim, won't it necessarily decide some of the merits of the underlying labor grievance, which as a matter of labor law is precisely what the Supreme Court sought to avoid by its *Steelworker Trilogy* policy? In terms of labor law the issue for the court in *Associated Milk Dealers* is whether the parties chose arbitration or negotiation as the *method* to resolve their dispute over the application of the most favored nation clause in light of the Jewel contract. Absent the antitrust claim, the district court would resolve that question without impinging on the arbitrator's power to decide the *merits* of the employers' claim, which was that the Jewel contract in fact triggered the opera-

[56] The Court was also inclined to examine evidence of collective bargaining history in *Meat Cutters Union v. Jewel Tea Co.*, 381 U.S. 676 (1965), a companion case to *Pennington* in which the Court was similarly divided into three groups of three justices each.

[57] In the Opinion of the Court Mr. Justice White said that an antitrust violation could not be proven only on the basis of union behavior in seeking uniform wages. There must be a showing that the union conspired with one group of employers to impose the uniform wages on other bargaining units. Note 2 to the Opinion of the Court mentioned without commenting upon the sufficiency of other evidence of conspiracy in the case, which in large part consisted of collective bargaining negotiations. 381 U.S. at 665-66.

tion of the most favored nation clause. A limited inquiry into collective bargaining history would have been appropriate provided the district court did not thereby reach the merits of that grievance. But since the antitrust claim is present and since the Seventh Circurit declared that it must be resolved in court before there can be a duty to arbitrate, the district court is now faced with a dilemma.

Mindful that it must not impinge upon the labor aribtrator's province of inquiry, the court must attempt to resolve the antitrust claim without deciding whether the most favored nation clause in fact applies to the Jewel contract. If the clause is inapplicable, then the grounds for asserting an antitrust violation would become moot as to the crux of the suit. So, the court might logically try to assume without deciding that the clause was triggered by the Jewel contract. The next question would be whether that is a violation of the Sherman Act, which under *Pennington* necessitates a rule of reason inquiry into collective bargaining history to see if the agreement was motivated by a predatory purpose. But that purpose cannot be characterized as unreasonable or predatory without deciding what the court originally stated it did not want to decide, *i.e.*, whether the clause is triggered by the Jewel contract. Furthermore, since the most favored nation clause might be reasonable as applied to milk dealers but not as to others, the court might additionally be required to decide whether the Jewel dairy is a milk dealer, which is another question that would have been resolved by a labor arbitrator absent the antitrust claim. In short, the antitrust allegations made in this case could entirely defeat any possibility of arbitrating the labor grievance out of which it arose. The reason is judicial reluctance to allow both claims to be resolved by the arbitration process.

In this regard, courts which have considered the matter have uniformly rejected arbitration as the method of resolving antitrust claims.[58] Citing *Silvercup Bakers, Inc. v. Fink Baking Corp.*[59] the Seventh Circuit declared:

> Arbitrators are ill-equipped to interpret the antitrust laws and their consideration of possible violations would add little. Indeed an agreement requiring arbitration of private antitrust claims would probably be unenforceable. . . .[60]

Silvercup was an action in which the plaintiff sued a baker's union for conspiring with the plaintiff's competitors to eliminate it from a particular

[58] *See generally* 3 A.L.R. Fed. 918 (1970) and the symposium on antitrust and arbitration in 44 N.Y.U. L. REV. 1069 (1969). *But cf.* Power Replacements, Inc. v. Air Preheater Co., Civil No. 68,213 (C.D. Cal., April 29, 1968), *rev'd*, 426 F.2d 980 (9th Cir. 1970) in which the district court's order to arbitrate antitrust claims was reversed but only because ". . . the parties agreed to arbitrate antitrust claims which were not in existence and the nature and effect of which were unknown when the agreement was made." 426 F.2d at 984.

[59] 273 F.Supp. 159 (S.D.N.Y. 1967) [hereinafter cited as *Silvercup*].

[60] 422 F.2d at 552.

market by causing the mass resignation of plaintiff's employees. The union sought to compel the arbitration of this claim as a grievance covered by its arbitration agreement with the employer. The court ruled that, absent specific exclusionary language in the contract, it must be assumed that neither party intended to forego their rights to a judicial determination of their tort claims against one another.[61] Furthermore, it doubted the legality of such an agreement or the enforceability of an award once made.[62]

In a different factual context the Second Circuit considered the merits of ordering the arbitration of antitrust claims arising out of a trademark licensing agreement and decided that the court was the appropriate forum.[63] Among the reasons given for its decision, the court cited the potentially monumental effect of antitrust violations on the public at large, the fact that arbitration clauses can often be the result of a contract of adhesion, and lack of antitrust expertise by commercial arbitrators. Thus, the interest of the parties as well as that of the public was thought best served by deciding antitrust claims in court.

Although this attitude has been criticized, it represents the nearly unanimous view of the courts;[64] and given the present scope and function of the arbitration process, it is not hard to see why. For example, in *Pennington*, the Court said:

> We think it beyond question that a union may conclude a wage agreement with the multi-employer bargaining unit without violating the antitrust laws and that it may as a matter of its own policy, and not by agreement with all or part of the employers of that unit, seek the same wages from other employers.[65]

As a matter of labor law, a uniform wage scale is recognized as a legitimate union objective[66] which could properly be affirmed in the course of arbitration proceedings. But even if a uniform scale is purposely used to drive out management's competitors, as alleged in *Pennington*, or merely has the effect of doing so, it may nevertheless retain its legitimacy as a labor objective and be upheld despite its anticompetitive effects. An arbitrator with expertise in the coal mining industry could easily conclude that the elimination of competition from the small mine operators would ultimately benefit the workers and remaining employers more than the continued existence of those small firms. On the other hand, a court is bound to enforce antitrust policy favoring the preservation of

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[61] 273 F.Supp. at 163, *citing*, Old Dutch Farms, Inc. v. Milk Drivers & Dairy Emp. Local U., 359 F.2d 598 (2d Cir. 1966).

[62] *Cf.* Wilko v. Swan, 346 U.S. 427 (1953).

[63] American Safety Equip. Corp. v. J. P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968).

[64] *See* note 58 *supra.*

[65] 381 U.S. at 664.

[66] Apex Hosiery Co. v. Leader, 310 U.S. 469, 503 (1940).

such competition; and given that additional objective, it might not be as sympathetic to a uniform wage agreement with predatory purpose and anticompetitive effect.

However, at least one author has suggested that the dangers in allowing arbitrators to decide antitrust claims have been overemphasized and that even within the present structure of arbitration proceedings the public interest in the outcome of private antitrust disputes would be adequately protected.[67] Indeed, the public is likely to suffer equally grave injuries from ill-advised labor or antitrust decisions regardless of the forum. Further, if the public's interest in the outcome of private antitrust suits is as great as is alleged, why does it remain subject to the right of the parties to effect an out-of-court settlement of their dispute? The settlement of antitrust claims apparently differs from the arbitration process only in the absence of a third party who is formally designated an arbitrator. Therefore, looking beyond the rhetoric that arbitration is inappropriate to the resolution of antitrust claims, more thought should be given to the reasons why arbitration is considered appropriate in one area and an anathema in another. This would seem particularly true of a case involving both labor and antitrust law, where an established arbitration process is readily available and where submission of both claims to arbitration would avoid the evidentiary problems of collective bargaining history discussed above.

IV. Summary & Conclusions

Associated Milk Dealers has provided a convenient forum for the examination of certain policies in antitrust and labor law and how those policies interact. First, it should be noted that, antitrust defenses aside, the Seventh Circuit declined to affirm the summary judgment to arbitrate the employer's claim because it was not sufficiently convinced that the parties had agreed to resolve such a dispute in that way. Although that action might be criticized on a literal reading of cases like the *Steelworkers Trilogy*, it is clearly consistent with the repeated emphasis by the Supreme Court on the contractual nature of the duty to arbitrate.

As to the antitrust issues, the Seventh Circuit was certainly on solid ground when it criticized the district court for summarily dismissing the union's antitrust challenge to the most favored nation clause. It was equally correct in holding that *Pennington* does not make such agreements illegal per se but rather requires proof of predatory purpose and anticompetitive effect. Further, reservation of the antitrust issues to the court rather than the arbitrator places the Seventh Circuit firmly within the line of reasoning adopted by most courts which have considered the issue. Nevertheless, there remains the possibility that on remand

[67] Asken, *Arbitration and Antitrust-Are They Compatible?*, 44 N.Y.U. L. Rev. 1097 (1969).

the district court will hear evidence and resolve issues in its determination of the antitrust claim which could ultimately restrict the arbitration of the underlying labor grievance contrary to national labor policy.

But whether the concern is national labor policy or improving the efficiency and expertise of the judicial process, the case in favor of the arbitration of antitrust claims is an appealing one, particularly when the suit involves labor grievances which would otherwise go to arbitration. At the very least, arbitrators could act as expert fact finders whose antitrust judgments would be subject to judicial review for possible misapplication of the law. In this regard, the character of arbitration might have to be modified somewhat to include such things as written findings of fact, but the resulting economies would seem to outweigh whatever disadvantages might accrue. In other words, although courts have been squarely opposed to the arbitration of antitrust disputes, the proposal deserves more than the rhetorical consideration it has been accorded to date.

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